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In The

Supreme Court of the United States

PITTSBURG COUNTY RURAL
WATER DISTRICT NO. 7,

Cross-Petitioner,

v.

CITY OF MCALESTER, ET AL.,

Cross-Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

STEVEN M. HARRIS, OBA #3913
Counsel of Record
MICHAEL D. DAVIS, OBA #11282
1350 South Boulder, Suite 700
Tulsa, OK 74119
(918) 592-1276
(918) 592-4389 (fax)

Attorneys for the Cross-Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Tenth Circuit incorrectly held that 7 U.S.C. § 1926(b) did not preclude a competitor, who was also the water supplier for the indebted association, from terminating water sales to the federally indebted association as a means to evade 7 U.S.C. § 1926(b) prohibitions and to compete with the indebted association within the association's protected service area?

2. Whether the Tenth Circuit applied a standard in conflict with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) when the Court determined Pitt-7 failed to present a genuine issue of fact concerning whether there was no reasonable and practical alternative supply of water?

3. Whether the Tenth Circuit applied a standard in conflict with *City of Chanute v. Williams Natural Gas Company*, 955 F.2d 641 (10th Cir. 1992) and 79 O.S. § 203(D)(3)(c) when it held Pitt-7 had a practical and reasonable alternative water supply available for purposes of the essential facilities doctrine?

PARTIES TO THE PROCEEDING

Cross-Petitioner

The Cross-Petitioner in this action is Pittsburg County Rural Water District No. 7, referenced herein as "Pitt-7". Pitt-7 is the Plaintiff in the underlying district court action, and is the Appellant in the underlying Tenth Circuit appeal.

Cross-Respondents

The Cross-Respondents are the City of McAlester and the McAlester Public Works Authority. The City of McAlester is a governmental entity. The McAlester Public Works Authority is a public trust, of which the City of McAlester is the sole beneficiary. Singular references to "McAlester" are intended to encompass both Cross-Respondents. The Cross-Respondents are Defendants in the underlying district court action, and are Appellees in the underlying Tenth Circuit appellate action.

The following additional parties should be considered as Cross-Respondents pursuant to Supreme Court Rule 12(6): (1) Kenneth W. Sherrill, (2) Linda F. Sherrill, (3) MIG, Inc., (4) Pittsburg County Regional Exposition Authority, (5) Pliant Corporation, successor to Huntsman Edison Films Corporation, successor to Blessing Corp., d/b/a Edison Plastics, (6) Tri-Cat, Inc., (7) Dennis DeFrange, (8) Terry Kinyon, (9) Bar-19, (10) Southeast Oklahoma Box Company, (11) Simmons Poultry Farms, Inc., (12) Pittsburg County Board of Commissioners, (13) Oben Weeks, (14) H.G. Gilliam, (15) Bill Webber, and (16) Thundercreek Gold Course Authority. These parties are "Additional Defendants" in the underlying district court

PARTIES TO THE PROCEEDING – Continued

action, and are "Appellees" in the underlying Tenth Circuit appellate action.

At the time of relevant events, Mr. Weeks, Mr. Gilliam, and Mr. Webber were members of the Pittsburg County Board of Commissioners, which was the state administrative body that entered deannexation orders altering Pitt-7's state-law political boundaries. These additional parties will be referenced herein as "the Commissioners" or "the Board of Commissioners."

The other "Additional Defendants" are landowners who joined in the deannexation proceedings before the Board of Commissioners and are referenced herein as "the Landowners". McAlester is also a landowner which joined in the deannexation proceedings before the Board of Commissioners.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	6
ARGUMENT FOR GRANTING WRIT	8
I. CONTRARY TO CONTROLLING U.S. SUPREME COURT PRECEDENT, THE TENTH CIRCUIT IMPROPERLY AFFIRMED SUMMARY JUDGMENT WHEN THERE WERE MATERIAL ISSUES OF FACT WHICH PRECLUDES SUMMARY JUDGMENT	8
II. THE TENTH CIRCUIT IMPROPERLY HELD THAT 7 U.S.C. § 1926(b) DOES NOT PRECLUDE A WATER SUPPLIER AND COMPETITOR FROM TERMINATING WATER SALES TO AN INDEBTED ASSOCIATION AS A MEANS TO EVADE § 1926(b) PROHIBITIONS AND TO COMPETE WITH THE ASSOCIATION WITHIN ITS PROTECTED SERVICE AREA	19
CONCLUSION	22

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)..... 9

City of Chanute v. Williams Natural Gas Company, 955 F.2d 641 (10th Cir. 1992) i

City of Madison v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057 (5th Cir. 1987) 20

City of McAlester v. Pittsburg County Rural Water District No. 7, 531 U.S. 1011 (2000)..... 3

Glenpool Utility Services v. Water District No. 2, 861 F.2d 1211 (10th Cir. 1988)..... 20

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421 (S.D. Ind. 1988) 20

MCI Communications Corp. v. American Telephone & Telegraph, Co., 708 F.2d 1081 (7th Cir. 1981)..... 8, 21

Moore Bayou Water Association, Inc. v. Town of Jonestown, 628 F.Supp. 1367 (N.D. Miss. 1986) 20

Pittsburg County Rural Water District No. 7 v. City of McAlester, 346 F.3d 1260 (10th Cir. 2003)..... 1

Pittsburg County Rural Water District No. 7 v. City of McAlester, 358 F.3d 694 (10th Cir. 2004)..... 2

Pittsburg County Rural Water District No. 7 v. City of McAlester, 531 U.S. 1011 (2000) 3

STATUTES

7 U.S.C. § 1926(b)..... *passim*

15 U.S.C. § 2..... 6

28 U.S.C. § 1254(1)..... 3

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 2101(c) 3

28 U.S.C. § 2106 3

79 O.S. § 203(D)(3)(c) 4, 8

RULES

Fed. R. Civ. P. 56(c) 9

Supreme Court Rule 14(1)(i)(i) 2

OPINION BELOW

Opinions, orders, and judgments underlying the current appeal.

The underlying litigation was initiated in the U.S. District Court for the Eastern District of Oklahoma. The district court entered an Order on June 7, 2002, granting McAlester's motion for partial summary judgment which disposed of the case in its entirety. Judgment was entered on June 12, 2002. The June 7, 2002 Order and June 12, 2002 Judgment are unpublished. The June 7, 2002 Order is included in Appendix D to the Petition for Writ of Certiorari, at page 94a. The June 12, 2002 Judgment is included in Appendix E to the Petition for Writ of Certiorari, at page 109a.

Pitt-7 appealed from the June 7, 2002 Order and June 12, 2002 Judgment. In that appeal, the U.S. Court of Appeals for the Tenth Circuit entered its Opinion on October 17, 2003, affirming in part and reversing in part the District Court's June 7, 2002 Order and June 12, 2002 Judgment. The October 17, 2002 Opinion was published as *Pittsburg County Rural Water District No. 7 v. City of McAlester*, 346 F.3d 1260 (10th Cir. 2003), and is included in Appendix C to the Petition for Writ of Certiorari, at page 49a.

On February 6, 2004, the Tenth Circuit entered its Order denying the parties' petitions for rehearing and rehearing *en banc*, "except with regard to [an] 'internal inconsistency.'" The February 6, 2004 Order is unpublished, but is included in Appendix A to the Petition for Writ of Certiorari, at page 1a.

The February 6, 2004 Order clarified the October 17, 2002 Opinion and directed that an amended opinion be filed and published. The Amended Opinion was filed on

February 6, 2004. The February 6, 2004 Amended Opinion is published as *Pittsburg County Rural Water District No. 7 v. City of McAlester*, 358 F.3d 694 (10th Cir. 2004), and is included in Appendix B to the Petition for Writ of Certiorari, at page 4a.

The prior appeal.

This litigation was the subject of a prior appeal, occurring before the entry of the June 7, 2002 Order and June 12, 2002 Judgment. The federal-court orders and judgments occurring prior to June 7, 2002 are not "entered in conjunction with the judgment sought to be reviewed," for purposes of Supreme Court Rule 14(1)(i)(i), and, therefore, are not included in the Appendix to this Cross-Petition for Writ of Certiorari.

The prior Orders and Judgment of the U.S. District Court for the Eastern District of Oklahoma were unpublished, although the District Court's November 26, 1997 Order is reported by Westlaw at 1997 WL 835210. The District Court Orders and Judgment were included in the Appendix to a Petition for Writ of Certiorari filed by McAlester in U.S. Case No. 00-323, and can be found online, in portable document format (pdf), at 2000 WL 33999313.

The Tenth Circuit's prior Order and Judgment are reported at 211 F.3d 1279 (table), and by Westlaw at 2000 WL 525942. The Tenth Circuit's prior Order and Judgment, and its order denying rehearing, were included in the Appendix to a Petition for Writ of Certiorari filed by McAlester in U.S. Case No. 00-323, and can be found online in portable document format (pdf), at 2000 WL 33999313.

On November 27, 2000, the U.S. Supreme Court denied McAlester's prior Petition for Writ of Certiorari, filed in the U.S. Case No. 00-323. *City of McAlester v. Pittsburg County Rural Water District No. 7*, 531 U.S. 1011 (2000). Similarly, on November 27, 2000, the U.S. Supreme Court denied Pitt-7's Cross-Petition for Writ of Certiorari, filed in U.S. Case No. 00-490. *Pittsburg County Rural Water District No. 7 v. City of McAlester*, 531 U.S. 1011 (2000).

JURISDICTION

The Tenth Circuit entered its Order and Judgment on October 17, 2002. [Appendix C.] On October 31, 2002, the Petitioners filed a timely Petition for Rehearing and Petition for Rehearing *En Banc* ("Combined Petition"). On February 6, 2004, the Tenth Circuit entered its Order denying all parties' petitions for rehearing and rehearing en banc, "except with regard to [an] 'internal inconsistency'." [Appendix A to the Petition for Writ of Certiorari] The February 6, 2004 Order clarified the October 17, 2002 Opinion and directed that an amended opinion be filed and published. The Amended Opinion was filed on February 6, 2004. [Appendix B to the Petition for Writ of Certiorari] McAlester filed its Petition for Writ of Certiorari within 90 days of the Tenth Circuit's February 6, 2004 Order on rehearing and its February 6, 2004 Amended Opinion. This Cross-Petition for Writ of Certiorari was filed in reliance on Rule 12.5 and is submitted within 30 days of the docketing of McAlester's Petition for Writ of Certiorari (Docketed on May 10, 2004). The Court's jurisdiction is sought under 28 U.S.C. §§ 1254(1), 2101(c), and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 1926. Water and waste facility loans and grants[1]

(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

79 O.S. § 203. Trust in restraint of trade-monopoly of trade – Refusal of access to essential facility – Actions by competitors

A. Every act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.

B. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a relevant market within this state.

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[1] The full text of 7 U.S.C. § 1926(b) is set forth in Appendix F to the Petition for Writ of Certiorari.

C. Without limiting any other section of Title 79 of the Oklahoma Statutes or applicable sections of Title 17 of the Oklahoma Statutes, it is unlawful for any person in control of an essential facility to unreasonably refuse to give a competitor or customer of an entity controlling an essential facility access to it upon reasonable terms if the effect of such denial is to injure competition. An injured competitor or customer may bring an action under Section 5 of this act to enforce the provisions of this section only when such injured competitor or customer does not have a remedy before the Corporation Commission.

D. As used in this section:

1. "Monopolize" means:

   a. the possession of monopoly power in the relevant market, and

   b. the willful acquisition or maintenance of that power by exclusionary conduct as distinguished from growth or development as a consequence of a superior product and/or service, business acumen, or historic accident;

2. "Monopoly power" means the power to control market prices or exclude competition; and

3. "Essential facility" means a facility:

   a. which is controlled by an entity that possess monopoly power,

   b. that a competitor would be unable to practically or reasonably duplicate,

   c. the use of which has been unreasonably denied to a competitor or a customer of the entity that possesses monopoly power, and

d. that it would be feasible to allow the competitor or customer to use or have access to without causing harm or to unreasonably interfering with the entity that possess monopoly power.

15 U.S.C. § 2, Monopolizing trade a felony; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

McAlester owns and operates water collection, treatment and distribution facilities to sell water to households, businesses, etc. (hereafter "Retail Water"). McAlester also sells water to other communities and rural water districts for resale (hereafter "Wholesale Water").

Pitt-7 owns and operates a water supply system to deliver water to its customers, but has no water treatment facilities of its own. Pitt-7 purchases 100% of its water requirements from McAlester, and has done so for at least 30 years.

Pitt-7 instigated this litigation to enforce its Title 7 U.S.C. § 1926(b) right to prohibit McAlester from selling

water to customers within the Pitt-7 Territory in competition with Pitt-7. When Pitt-7 filed suit to enforce this right, McAlester threatened to terminate water sales to Pitt-7. Pitt-7 amended its complaint to enjoin McAlester from terminating water sales to Pitt-7 on various grounds, including violation of § 1926(b), violation of Oklahoma Antitrust Statutes and violation of Federal Antitrust Statutes.[2]

The Tenth Circuit held that § 1926(b) does not preclude McAlester from terminating water sales to Pitt-7 and that Pitt-7's state and federal antitrust claims fail due to lack of evidence that McAlester is the only available source of water to Pitt-7. Appendix B to Petition for Writ of Certiorari, at pp. 87a-88a.

The effect of the Tenth Circuit's decision is that McAlester may terminate water sales to Pitt-7 although all evidence shows that any potential alternative water source available to Pitt-7 is 3-5 years into the future and would cost millions of dollars. Pitt-7 would have no water to serve the needs of its customers (over 750 individual houses and businesses) until money is raised and a new water source is connected.

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[2] The Tenth Circuit's decision incorrectly states that McAlester terminated water sales as of June 30, 1999. McAlester's city council voted to terminate water sales as of June 30, 1999, but McAlester has not actually terminated such sales.

ARGUMENT FOR GRANTING WRIT

I. CONTRARY TO CONTROLLING U.S. SUPREME COURT PRECEDENT, THE TENTH CIRCUIT IMPROPERLY AFFIRMED SUMMARY JUDGMENT WHEN THERE WERE MATERIAL ISSUES OF FACT WHICH PRECLUDE SUMMARY JUDGMENT

The Tenth Circuit's decision upholds a summary judgment dismissing Pitt-7's State and Federal Antitrust claims upon the factual finding that McAlester is not a monopolist for the purposes of the essential facilities doctrine, i.e., that Pitt-7 has a practical and reasonable alternative water service available to it.

Determining whether a competitor has an alternative facility available to it under the State and Federal Antitrust laws depends on whether the customer/competitor (Pitt-7) can "practically or reasonably" duplicate the facility. *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir. 1981) and 79 O.S. § 203(D)(3)(c).[3]

The standard for granting and affirming summary judgment provides that summary judgment is appropriate

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[3] This action illustrates the apparent conflict between antitrust laws and § 1926(b). McAlester is precluded from competing with Pitt-7 by operation of § 1926(b). McAlester's strategy is straight forward. If it can successfully terminate Pitt-7's only reasonable and practical water source, McAlester will undoubtedly then claim that Pitt-7 is no longer "making service available" thus, extinguishing Pitt-7's § 1926(b) protection. Termination of the water supply would directly frustrate the mandate of § 1926(b) by curtailing or limiting the service provided or made available by Pitt-7.

"if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court must draw all justifiable inferences in favor of the non-moving party (Pitt-7). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If a reasonable person could find that Pitt-7 could not "practically and reasonably" duplicate the facility, either by connecting to another provider or constructing its own facilities, summary judgment is improper.

In affirming the Trial Court's decision, the Tenth Circuit relied on three (3) *alleged* "facts" to find Pitt-7 had alternative water sources available:

- First, Pitt-7 has represented in filings to the federal government that it has "a suitable available alternative water supply" to McAlester.
- Second, Pitt-7 has conceded that there exists other water treatment plants besides McAlester in Pittsburgh County and its environs.
- Third, Pitt-7 has stated that it could duplicate the facility operated by McAlester by constructing its own collection and treatment facility by as early as April 2004.

Appendix B to Petition for Certiorari, at pp. 47a-48a.

The evidence presented created material issues of fact concerning whether Pitt-7 had an alternative water supply which was practically and reasonably available:

- McAlester, within its motion for summary judgment alleged Pitt-7 had represented to the federal government that it had a "*suitable* available alternative water supply". (Emphasis Added). In support of this statement, McAlester presented the Deposition of Bill Hegdale. Mr. Hegdale's testimony both in his 1997 deposition and at the hearing for injunction showed that there was no "suitable available alternative water supply" and that any communication to the federal government relating to a *possible or potential* alternative water supply was a mere "formality".

Q. In connection with loan applications to the Federal Government, was there information conveyed to the Government regarding the potentiality of an alternative source of supply or water source that the water district could utilize if, in fact, the McAlester water source became unavailable?

A. Merely a possibility.

* * *

Q. Did you become knowledgeable regarding the Government's evaluation of the suitability of the alternative water source that was described on F4?

A. Yes, just recently.

Q. And what was the suitability of the alternative water source that had been proposed in 1993?

A. The last – next to the last paragraph states that RD has accepted contracts in the past that did not meet regulations based on an acceptable alternate water source.

Transcript on Motion for Injunction Pending Appeal, App. 17-App. 18.

Q. Within this area that McAlester – geographic region for which McAlester currently sells water, including the Water District for which it has customers, are you aware of any other competitor of McAlester who has a water facility that would be adequate to suit the needs of Water Number 7?

A. No, I'm not.

Q. Can you see or perceive harm to the customer base and to the Water District itself were McAlester to cease selling water in June of 1999?

A. Yes, there would be.

Q. What would be that effect if water were to be turned off on June 30, 1999, what would be the next course that the Water District would need to follow?

A. There really isn't any other source of water for us. And water being the essential entity that it is, I don't know what we would do.

Q. Are you aware of any alternative source available to your customer base for purposes of drinking water, sewer, washing, cleaning, et cetera?

A. No.

Transcript on Motion for Injunction Pending Appeal, App. 19-App. 20.

Q. Would it [sic] reasonable or practical for the Water District to connect and obtain water

from the City of Tulsa or the City of Oklahoma City?

A. No.

Q. Would that also be true with the other entities that counsel asked you about, Atoka, Adamson, Crowder, Krebs and Coalgate?

A. We felt that it would be.

Q. Based upon your knowledge – and how many years have you been with the Water District?

A. Nine years, ten years.

Q. And, based upon your knowledge and experience, would it be reasonable or practical for the Water District to construct its own water facility?

A. No, it would not.

Q. Would it be reasonable and practical to contact – not contact, but connect as a method of alternative water source to the other entities that counsel describe to you?

A. No, it would not.

Transcript on Motion for Injunction Pending Appeal, App. 20-App. 21.

The only other evidence submitted by McAlester in support of this alleged fact was a May 19, 1993 letter to FmHA from Pitt-7's outside engineer which suggested a *possible or potential* alternative water source, without reference to the time or cost (reasonableness or practicality) of such source and which was only meant to meet the "formality" of the FmHA requirements. The FmHA

responded in their letter of *May 24, 1993*, requesting information concerning the reasonableness and practicality of the possible alternative water source stating:

> "We have received your alternate water source memo dated May 19, 1993 reflecting a possible well as an alternate for RWD #7, Pittsburg County if water from the City of McAlester was no longer available.
>
> It is necessary for you to provide a estimated cost relative to developing this well source as a water supply, for FmHA to determine *if it is a feasible alternative*. The cost should include developing the wells cost of any probable treatment and any additional line work that may be necessary to tie into the District's system."

May 24, 1993 letter from Farmers Home Administration to Cecil Eildman, App. 11 (Emphasis Added).

The FmHA later acknowledged that the possible alternative water source presented by Pitt-7 was *not* feasible by stating that "Rural Development has accepted contracts in the past that did not meet regulations based on an acceptable alternative water source. . . ." and that "*This may be the case on this District*" June 24, 1996 letter from USDA, App. 9 (Emphasis Added).

In response to McAlester's evidence, Pitt-7 submitted the following additional evidence:

- Pitt-7 admitted that it did represent it had a *possible* alternative source of water to the FmHA in 1994. However, Pitt-7 presented evidence that this possible alternative source was too costly and would take too long to

construct (3 million dollars and approximately 3 years). See Michael Spear Supplemental Report, App. 22-App. 23, and Affidavit of Bill Hegdale, App. 2-App. 6.

- Pitt-7 presented evidence that it was advised that a feasible alternative water source was not required and the alternative source provided was nothing more than a possibility, which was not a realistic alternative at the time. Transcript of Hearing on Motion For Injunction Pending Appeal, App. 17-App. 18.

- The FmHA acknowledged that the possible alternative water source was not realistic (not reasonable or practical), noting that it had accepted contracts in the past which did not have a proper alternative water source and that "this may be the case on this District." June 24, 1996 Letter from FmHA to Pitt-7, App. 9.

There was substantial evidence presented from which a reasonable person could conclude Pitt-7 never advised the federal government that it had a "*suitable*" alternative water source and that both Pitt-7 and the federal government recognized the *possible* alternative water source was neither suitable, reasonable nor practical.

In relation to the Tenth Circuit's finding that Pitt-7 conceded that there exists other water treatment plants in addition to the one operated by McAlester in Pittsburg County and its environs, Pitt-7 has never disputed there were other facilities within Pittsburg County, or for that matter somewhere in the region. However, that is *not* an

admission that such facilities constitute a reasonable, practical or suitable alternative water source for Pitt-7.

The evidence presented by Pitt-7 and McAlester shows that such facilities were *not* reasonable, practical nor a suitable alternative source of water. At the very least, a reasonable person could conclude from the evidence that the other facilities located within the region were not reasonable, practical or suitable alternatives. The evidence in this regard shows:

- McAlester owns and operates the only wholesale water treatment and distribution system in the area which is capable of meeting the current water needs of Pitt-7's customers. Affidavit of Bill Hegdale, App. 4-App. 6 and Declaration of Judy Moore, App. 24-App. 25 noting that Pitt-7 conducted a thorough search for an alternative water supply with no success.

- After Pitt-7 received notice from McAlester that it was considering termination of water sales to Pitt-7, Pitt-7 contacted various water suppliers in the area seeking an alternative water source and each of those suppliers indicated they could not or would not sell water to Pitt-7. Affidavit of Bill Hegdale, App. 4-App. 6 and Transcript of Hearing App. 17-App. 21 and Declaration of Judy Moore, App. 24-App. 25.

- The various entities contacted by Pitt-7 seeking an alternative water source, are the only possible alternative water sources for Pitt-7. Affidavit of Bill Hegdale, App. 4-App. 6, Transcript of Hearing, App. 17-App. 23 and Declaration of Judy Moore, App. 24-App. 25.

- The various additional entities McAlester asserts Pitt-7 should have contacted are simply too far away to be reasonable alternatives due to time and costs to connect. Transcript of Hearing, App. 20-App. 21.

- Pitt-7 cannot practically or reasonably duplicate the facilities of McAlester. Affidavit of Bill Hegdale, App. 4-App. 5, Declaration of Michael Spear, App. 22-App. 23, Affidavit of Phil Brown, App. 14-App. 16 and Declaration of Judy Moore, App. 24-App. 25.

From this evidence, a reasonable person could conclude that although there are other water suppliers within the County and its environs, such suppliers are not reasonable and practical alternative water sources for Pitt-7.

The Tenth Circuit's finding that Pitt-7 could duplicate the facility operated by McAlester by constructing its own treatment and distribution facility as early as April 2004, also does not take into consideration whether such action is reasonable, practical or suitable. See Affidavit of Bill Hegdale, App. 5-App. 6. This finding was apparently based on the fact that at one time Pitt-7 had joined with other rural water districts to form the Kiamichi Improvement Authority to construct water collection and treatment facilities. However, the existence of the Kiamichi Improvement Authority project does not end the inquiry of whether that project is reasonable, practical or a viable alternative. Indeed, as reflected by the Declaration of Judy Moore (Pitt-7's manager), the Kiamichi Improvement Authority project *proved to be unreasonable and impractical*, and was *abandoned* when other participants in the project withdrew:

"2. When McAlester began threatening to terminate water sales to Pitt-7, Pitt-7 conducted a thorough search for an alternative water source with no success.

3. We have not been able to locate an *existing*, alternative water source capable of meeting our requirements. The only source Pitt-7 had available to it that would have been capable, was the Kiamichi Improvement Authority's development of a 6.4 million dollar treatment plant and distribution lines to service an area of approximately 25 miles south of Crowder, OK. This regional plant was to serve seven wholesale entities, including Pitt-7. Kiamichi Improvement Authority estimated it will be approximately *three years* until completion of this project. *However, this project is now not going forward because participants opted out and it was not feasible for Kiamichi Improvement Authority to complete without sufficient participants.*

4. Pitt-7 has engaged Myers Engineering to construct water collection and treatment facility, but at this time it is anticipated such a project will take approximately 3-4 years to complete, once funding is made available.

5. Pitt-7 has been unable to locate any alternative source of water to serve its customers other than McAlester."

Declaration of Judy Moore, App. 24-App. 25 (Emphasis Added).

Pitt-7 also presented the testimony of a licensed engineer, Phil Brown, who testified that if the Kiamichi project failed (as it did), it would take approximately 5 years and over 3 million dollars for Pitt-7 to duplicate the

facilities of McAlester needed to supply water for Pitt-7. Affidavit of Phil Brown, App. 14-App. 16. Mr. Brown also testified that such a project "would *not* be a feasible solution as a water source for RWD #7 Pittsburg County," Affidavit of Phil Brown, App. at 16 (Emphasis Added).

Pitt-7's position that it could not duplicate the facilities of McAlester is further supported by the testimony of Bill Hegdale at the injunction hearing that it was not reasonable or practical for Pitt-7 to construct its own water facility:

> Q. Based upon your knowledge – and how many years have you been with the Water District?
>
> A. Nine years, ten years.
>
> Q. And based upon your knowledge and experience, would it be reasonable or practical for the Water District to contract its own water facility?
>
> A. No, it would not.

Transcript of Hearing, App. 21.

Again, as with the other two alleged facts relied on by the Tenth Circuit, the evidence simply does not support a finding that Pitt-7 can reasonably or practically duplicate the facilities of McAlester. At the very least, there is sufficient evidence presented by Pitt-7 which precludes resolution of this issue on summary judgment.

II. THE TENTH CIRCUIT IMPROPERLY HELD THAT 7 U.S.C. § 1926(b) DOES NOT PRECLUDE A WATER SUPPLIER AND COMPETITOR FROM TERMINATING WATER SALES TO AN INDEBTED ASSOCIATION AS A MEANS TO EVADE § 1926(b) PROHIBITIONS AND TO COMPETE WITH THE ASSOCIATION WITHIN ITS PROTECTED SERVICE AREA

Pitt-7 contended that McAlester threatened to terminate water sales to Pitt-7 as a method to evade Pitt-7's § 1926(b) protection.

The Tenth Circuit recognized that § 1926(b) precludes encroachment through competition, but held it would not apply to anti-competitive acts. The Tenth Circuit's ruling suggests that while § 1926(b) precludes a competitor from selling water within the service area of an indebted association, it does not preclude other actions by a competitor that would eliminate or frustrate the association's ability to provide service, i.e., would permit McAlester to accomplish indirectly through denial of water sales to Pitt-7, what it could not do by direct encroachment.

Section 1926(b) prohibition against encroachment is not limited to direct sales of water in competition with the association, but also prohibits any act which would curtail or limit the service provided or made available by the indebted association.

Although no court has previously addressed this specific issue [whether § 1926(b) would preclude an indebted association's water supplier from terminating or limiting water sales to the association as a means to take over areas or customers of the association], all courts which have addressed § 1926(b) have held the statute

must be interpreted broadly to protect the indebted water district no matter what form the curtailment or limitation may take. *Jennings Water, Inc. v. City of North Vernon, Inc.*, 682 F.Supp. 421, 425 (S.D. Ind. 1988), affirmative at 895 F.2d 311 (7th Cir. 1989); *Glenpool Utility Services v. Water District No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988); *Moore Bayou Water Association, Inc. v. Town of Jonestown*, 628 F.Supp. 1367 (N.D. Miss. 1986); *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057 (5th Cir. 1987).

The threatened action (denying Pitt-7 water when no other source of water is reasonably available combined with a concerted effort to takeover the water district's service area) is simply another unlawful means to curtail or limit the service made available by Pitt-7. The *Bear Creek* court held "to read a loophole into the absolute prohibition . . . and allow a city to do via condemnation *what is forbidden* ***by other means****, would render nugatory the clear purpose of 1926(b)." City of Madison v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987). (Emphasis Added). McAlester is simply using a new strategy to circumvent § 1926(b).

The Tenth Circuit's decision also overlooks the importance of McAlester as a subdivision of the State of Oklahoma. By allowing the association to borrow from the federal government, the State of Oklahoma and all of its agencies and subdivisions (including McAlester) accepted the obligations that came with that borrowing, including § 1926(b). *Glenpool Utility Services Authority v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1216 (10th Cir. 1988).

In this instance, the State of Oklahoma acting through its agency Pitt-7 borrowed money from the federal government, in part, based upon McAlester (a state political subdivision) selling water to the association, i.e., being the primary source of water for Pitt-7 to deliver to its customers. The state is now, acting through its subdivision McAlester, seeking to withdraw the very water service which was the foundation on which the loan was granted. Such action violates the interests and purposes of § 1926(b) and must be stopped.

Lastly, it has been held that an action which might otherwise be lawful is unlawful and a violation of law if the action is taken to obtain an illegal result. *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1149 (7th Cir. 1981). If McAlester is not otherwise precluded by law from terminating water sales to Pitt-7, and if the intended and real effect of such termination is part of an effort to circumvent § 1926(b), the termination of water sales itself is a violation of § 1926(b).

CONCLUSION

WHEREFORE, Pitt-7 prays the Court will grant Certiorari to address the application of § 1926(b), as well as clarification of the appropriate standard relating to an "essential facility" under state and federal antitrust laws and the applicable standard under summary judgment.

Respectfully submitted,

DOYLE HARRIS DAVIS & HAUGHEY

STEVEN M. HARRIS, OBA #3913
MICHAEL D. DAVIS, OBA #11282
1350 South Boulder, Suite 700
Tulsa, OK 74119
(918) 592-1276
(918) 592-4389 (fax)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA,

Plaintiff,

vs.

CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust,

Defendants,

KENNETH W. SHERRILL, LINDA F. SHERRILL, CITY OF MCALESTER, BAR-19, BLESSING CORP /d/b/a EDISON PLASTICS, MIG, INC., SOUTHWEST OKLAHOMA BOX COMPANY, TRI-CAT, INC., SIMMONS POULTRY FARMS, INC., DENNIS DEFRANGE, TERRY KINYON, PITTSBURG COUNTY REGIONAL EXPOSITION AUTHORITY, THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PITTSBURG, H.G. GILLIAM, BILL WEBBER, OBEN WEEKS, and THUNDERCREEK GOLF COURSE TRUST AUTHORITY,

Additional Defendants.

Case No. CIV-97-185-B

AFFIDAVIT OF BILL HEGDALE

COMES NOW the Affiant, being of lawful age and duly sworn upon oath and deposes and states:

1. My name is Bill Hegdale.

2. I am the Chairman of the Board for Pittsburg County Rural Water District No. 7 ("Pitt-7").

3. The statements contained herein are based upon my personal knowledge and are true and correct.

4. Pitt-7 is a federally indebted rural water district established under Oklahoma law for the purpose of providing the residents within its territory clean, safe water at a reasonable price. 82 O.S. §1324.6; Section 1306 (1970) repealed 1972, 82 O.S. Section 1324.3).

5. The Defendant City of McAlester is an Oklahoma municipality.

6. The Defendant McAlester Public Trust Authority is an Oklahoma public trust created pursuant to 60 O.S. § 176 et seq.

7. The Defendants (collectively hereafter referred to as "McAlester") own and operate water collection, treatment and distribution facilities to sell water to and users households, businesses etc. (hereafter "Retail Water") and McAlester also sells water to other communities and rural water districts for resale (hereafter "Wholesale Water").

8. Pitt-7 has a water supply system to deliver water to its residents, but has no water treatment facilities of its own. Pitt-7 purchases its water from McAlester. Pitt-7 currently purchases 100% of its water requirements from

McAlester, and has purchased water from McAlester for over 30 years.

9. In the Spring of 1996, McAlester submitted to Pitt-7 a written contract which sets forth the terms and conditions pursuant to which McAlester would sell water to Pitt-7.

10. Pitt-7 accepted this offer submitted by McAlester by signing the proposed contract, and returning it to McAlester. (The 1996 Water Purchase Contract).

11. Pitt-7 and McAlester have since that time, purchased and sold water pursuant to the terms of the 1996 Water Purchase Contract. The contract by its own terms, does not expire until *June 2000.*

12. Pitt-7 instigated the above styled litigation to enforce its Title 7 USC §1926(b) rights to prohibit McAlester from selling water to customers within the Pitt-7 Territory, When Pitt-7 asserted these rights, McAlester threatened to terminate water sales to Pitt-7. Thus, Pitt-7 included claims seeking to enjoin McAlester from terminating water sales to Pitt-7 on various grounds, including breach of contract, violation of §1926(b), breach of good faith, violation of 79 O.S. §4 and public policy and violation of Federal Antitrust Statutes.

13. During the pendency of the litigation (at the second pretrial conference) McAlester advised the Court it had no present intent to terminate water sales to Pitt-7. Ex. 1, St. No. 13.

14. Upon Motion For Summary Judgment, the Trial Court dismissed all Pitt-7 claims, including the claims for injunctive relief relating to McAlester's threat to terminate water sales to Pitt-7, holding in pertinent [sic] that:

a. Pitt-7 could not make a claim for injunctive relief against a municipality for violation of Federal Antitrust Statutes;

b. Pitt-7 had no §1926(b) protection which would be violated by McAlester's termination of water sales; and

c. Dismissing all state law claims, because all federal claims were dismissed, refusing to assume jurisdiction over the state law claims.

15. After the Court's rulings, McAlester announced it will terminate water sales to Pitt-7 effective June 30, 1999.

16. McAlester owns and operates the only wholesale water collection and distribution system in the area which is capable of meeting the current water needs of Pitt-7 and its customers.

17. McAlester controls over 50% of the relevant market, (the relevant market being defined as that area in which McAlester operates and to which Pitt-7 can practically turn for a water source).

18. Pitt-7 has the inability to practically or reasonably duplicate the essential facility (wholesale water collection, treatment and distribution facilities) owned by McAlester because to conduct its own facilities would require approximately three (3) years and would cost Pitt-7 an estimated $3,375,000.00.

19. It is feasible for McAlester to sell water to Pitt-7 because:

a. It has done so for over 30 years;

b. It has sufficient surplus water and capacity to meet all of Pitt-7's needs; and

c. It sells water to Pitt-7 at a profit.

20. If McAlester is allowed to terminate water sales to Pitt-7, Pitt-7 and the residents within the Pitt-7 Territory will suffer irreparable injury.

21. Pitt-7 cannot obtain from other sources a sufficient water supply to meet all the requirements of the residents within the Pitt-7 Territory, within the near future. Pitt-7 is pursuing diligently alternative water sources and has during the pendency of the suit.

22. Pitt-7 has fully performed each of its obligations under the 1996 Water Purchase Contract and is not in default of the provisions. McAlester's efforts to terminate the Contract is an obvious attempt to compel concessions from Pitt-7 and to violate Pitt-7's 1926(b) rights.

23. The granting of the requested relief will cause no prejudice or damage to McAlester. (This is true because McAlester has a surplus of water and McAlester currently sells a portion of such surplus water to Pitt-7 *at a profit*.)

24. If the requested relief is not granted, many Pitt-7 customers will be without water and it is estimated it will take approximately three (3) years to provide adequate water to such customers through the Kiamichi Improvement Authority.

25. After receiving notice from McAlester of its intent to terminate water sales to Pitt-7, Pitt-7 has conducted a search for an alternative water supply.

26. In conducting the search for an alternative source of water Pitt-7 has contacted the following water

suppliers in Pittsburg County and Hughes County, Oklahoma, and each has indicated it does not have the capability to supply the quantity we would require:

1. Hughes Co. RWD #2 in Stuart, OK
2. Pittsburg Co. RWD 15 in Haywood, OK
3. McAlester Army Ammunition Plant, Dept. of the Army, in Savanna, OK
4. Indianola Water Co. in Indianola, OK

27. We have not been able to locate an *existing*, alternative water source capable of meeting our requirements. The only source Pitt-7 has available to it that is capable, is the Kiamichi Improvement Authority's development of 6.4 million dollar treatment plant and distribution lines to service an area of approximately 25 miles south of Crowder, OK. This regional plant will serve five wholesale entities, including Pitt-7. Kiamichi Improvement Authority estimates it will be approximately *three years* until completion of this project.

FURTHER AFFIANT SAYETH NOT.

/s/ Bill Hegdale
BILL HEGDALE

Subscribed and sworn to before me this 7th day of January, 1999.

/s/ Judith R. Moore
Notary Public

My Commission Expires:

Sept. 6, 1999

United States Department
of Agriculture

100 USDA, Suite 108
Stillwater, Oklahoma 74074
(405) 742-1060
(FAX) (405) 742-1101

Rural
Development

June 24, 1996

SUBJECT: RWD #7, Pittsburg County
Excerpt from the Water Purchase
Contract with City of McAlester

TO: Rural Development Manager,
Rural Development Atoka, OK

We have completed review of the June 21, 1996 memo from the above District which requests clarification and/or approval of certain language.

Item 5 of our guide Water Purchase Contract provides for increasing and/or decreasing of rates be based upon the costs of performance (providing water to purchaser), but not include increased capitalization of the Seller's system that does not benefit the purchaser. For example, McAlester constructs line extensions to serve additional customers, this provides no benefit to the District nor does it affect the cost of production to sale [sic] potable water to the District. These costs should not be passed on to the District. If a contract was submitted with this language, it would be approvable.

Item C. *Modification of Contract* (appears to be from existing contract between the District and McAlester), points out grounds for re-negotiation of the contract rates if cost of production and delivery increases. It also goes further to state the rate is "based upon operation, maintenance, and administrative costs of production and delivery

of potable water *and an estimated cost of constructing a new water treatment facility*". It appears McAlester may charge for estimated construction costs, then adjust for actual costs once construction is completed.

From this language it would appear McAlester could adjust the District's rate based on a proposed plan and not an approved plan of construction. A proposal may be in the works for years before actual approval is obtained on a project. Appropriate rate adjustments should be made at the time a project has its plans, specifications and financing packages in place, not when a project is still in the planning stages. Rural Development would question this language if submitted for approval, however, if the purchaser was agreeable to the language, Rural Development may concur.

We would like to point out Senate Bill No. 834 amended language in 11 O. S. 1991 on 6-8-94 to clarify rate adjustments as follows:

Section 37-1119. A. All contracts for the sale or furnishing of water from a source obtained by or on behalf of a municipality by permit or prior right under state law or be general obligation bonds shall be made in the name of the municipality as provided for by statute or by charter.

B. All such water sold and furnished to persons or public or private entities outside the corporate limits of the municipality shall be sold and furnished upon written contracts which shall provide for an annual review of the municipality's costs and contract modification of rates to permit rates to be increased or decreased to the purchasers as appropriate. Any modification shall be nondiscriminatory [sic] allocated between the municipality's customers and the purchaser. Provided, however, that only those

costs that are attributable to maintaining the ability of the municipality to provide water service to the purchaser shall be included in purchaser's rates.

The contracts shall provide that the persons or public or private entities outside the corporate limits of the municipality shall be subject to a rationing program consistent with any rationing program ordered by the municipality.

Section 2. Beginning July 1, 1996, if a municipality selling water to persons or public or private entities outside corporate limits has not implemented an enterprise accounting system to account for the cost of water supply, treatment and delivery to the point of delivery to the purchaser's water system, it shall be liable to the purchaser for the reasonable expenses of such an accounting exceeding the expenses which the purchaser would have incurred using an enterprise accounting system.

Since the contract is up for re-negotiation, we would recommend the District and their attorney work with the City of McAlester on any contract modifications the District may desire. Once a contract is negotiated, it should be forwarded to our office for concurrence.

Please note Rural Development has accepted contracts in the past that did not meet regulations based on an acceptable alternate water source determination by the District Office. This may be the case on this District.

If you have any questions, please contact Christy Hodge, State RU/CF Specialist.

/s/ Harvey D. Smith
HARVEY D. SMITH
Rural Utilities Program Director

Rural Development is an Equal Opportunity Lender.
Complaints of discrimination should be sent to:
Secretary of Agriculture, Washington, D.C. 20250

United States Department
of Agriculture

P. O. Box 369
Muskogee, Oklahoma 74402
(918) 683-6498

Farmers Home Administration

May 24, 1993

Mr. Cecil Wildman
Spear & McCaleb, Co., Inc.
815 W. Main
Oklahoma City, OK 73106

Dear Mr. McCaleb:

We have received your alternate water source memo dated May 19, 1993 reflecting a possible well as an alternate for RWD #7, Pittsburg County if water from the City of McAlester was no longer available.

It is necessary for you to provide a [sic] estimated cost relative to developing this well source as a water supply, for FmHA to determine if it is a feasible alternative. The cost should include developing the well, cost of any probable treatment and any additional line work that may be necessary to tie into the District's system.

Sincerely,

/s/ [ILLEGIBLE]
CHRISTY J. WOOLSEY
Community & Business Program Specialist

Attachments

cc: RWD #7, Pittsburg County

Farmers Home Administration is an Equal Opportunity Lender.

Complaints of discrimination should be sent to:
Secretary of Agriculture, Washington, D.C. 20250

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	Case No. CIV-97-185-B
CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust,	)	
Defendants,	)	
KENNETH W. SHERRILL, LINDA F. SHERRILL, CITY OF MCALESTER, BAR-19, BLESSING CORP /d/b/a EDISON PLASTICS, MIG, INC., SOUTHWEST OKLAHOMA BOX COMPANY, TRI-CAT, INC., SIMMONS POULTRY FARMS, INC., DENNIS DEFRANGE, TERRY KINYON, PITTSBURG COUNTY REGIONAL EXPOSITION AUTHORITY, THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PITTSBURG, H.G. GILLIAM, BILL WEBBER, OBEN WEEKS, and THUNDERCREEK GOLF COURSE TRUST AUTHORITY,	)	
Additional Defendants.	)	

AFFIDAVIT OF PHIL BROWN

COMES NOW the Affiant Phil Brown, being of lawful age and duly sworn upon oath deposes and states:

1. My name is Phil Brown, I am a licensed engineer with the State of Oklahoma, and a copy of my resume is attached hereto as Exhibit 1.

2. I was asked by Pittsburg County Rural Water District No. 7 (Pitt-7) to estimate the costs of constructing alternative water treatment and transmission facilities to meet the needs of Pitt-7's customers should McAlester terminate water sales to Pitt-7 and the Kiamichi Improvement Authority project did not proceed.

3. My letter dated December 23, 1998, attached hereto as Exhibit 2, sets forth my opinion relating to the cost to construct such facilities.

4. Furthermore, it is estimated it would take approximately 5 years to obtain the necessary approvals and complete construction of such facilities.

FURTHER AFFIANT SAYETH NOT.

/s/ Phil Brown
Phil Brown

Subscribed and sworn to before me on this 18th day of May, 1999.

/s/ Chris Hodge Rard
Notary Public

My Commission Expires:

MY COMMISSION EXPIRES 2-23-00

[LOGO] ***Brown Engineering***
Civil & Environmental

TEL: (405) 372-4846 • FAX: (405) 372-7065 • P.O. Box 579 • Stillwater, Oklahoma 74076-0579

December 23, 1998

Judy Moore
Pittsburg County RWD # 7
HCR 75, Box 211
Haywood, Oklahoma 74501

Dear Judy:

The following cost estimate is to develop a water treatment plant and transmission line to serve RWD # 7 Pittsburg County only if the Kiamichi Improvement Authority did not continue and construct a wholesale water district.

Item	Description	Cost
1	500 gpm Water Treatment Plant	$850,000.00
2	300,000 Gallon Ground Storage	$150,000.00
3	122,000 ft 12" PVC Class 200 @ $12.00/ft	$1,464,000.00
4	30-12" Gate Valves @ $1500 ea	$45,000.00
5	1,500' Road Bores @ $75/ft	$112,500.00
Estimated Construction Cost		$2,621,500.00
6	Contingencies	$265,500.00
7	Engineering	$175,000.00
8	Inspection	$60,000.00
9	Legal	$55,000.00
10	DEQ Review Fees	$2,000.00
11	Surveys, Soil Bores, etc.	$21,000.00
12	Interest During Construction	$175,000.00
Estimated Project Cost		$3,375,000.00

The debt payment on a loan of this amount repaid over a period of 40 years at 5.0 % interest which would be a loan from USDA-RD which is the lowest cost available would be $196,695.00 per year. With 760 users this would be an average monthly debt and reserve cost (10.0%) alone of $23.72 per user per month. This would not be a feasible solution as a water source for RWD # 7 Pittsburg County.

If you have any questions at any time please contact this office at (405) 372-4848.

Thank you.

/s/ Phil Brown
Phil Brown, P.E.

EXCERPTS FROM TRANSCRIPT OF HEARING ON MOTION FOR INJUNCTION PENDING APPEAL DATED MAY 21, 1999

Testimony of Bill Hegdale, Chairman of the Board of Pittsburg County Rural Water District No. 7

* * *

[10] A. We have small businesses. We have rural homeowners.

Q. Now, there came a time – and let me refer you to Exhibit 37 in the book there before you.

And I have specific reference to page F4.

Are you familiar with that document?

A. Yes.

Q. In connection with loan applications to the Federal Government, was there information conveyed to the Government regarding the potentiality of an alternative source of supply or water source that the water district could utilize if, in fact, the McAlester water source became unavailable?

A. Merely a possibility.

Q. Is that alternative water source described in this document, page F4 of Exhibit 37?

A. Paragraphs 3 and 4 discuss the possibility of the water district drilling their own wells.

Q. Since the drafting of the letter, 1993, has there been any effort on the part of the water district to pursue further this alternative water source that's describe in this document?

A. No, there hasn't.

Q. Is this the only alternative water source suggested or communicated to the Government in connection with your loan applications?

[11] A. I believe so.

Q. If you would then refer to page F2, next to the last paragraph on the page.

Did you become knowledgeable regarding the Government's evaluation of the suitability of the alternative water source that was described on F4?

A. Yes, just recently.

Q. And what was the suitability of the alternative water source that had been proposed in 1993?

A. The last – next to the last paragraph states that RD has accepted contracts in the past that did not meet regulations based on an acceptable alternate water source.

THE COURT: Where is he reading from?

MR. HARRIS: Your Honor, he's reading from the next to the last paragraph of – this is Exhibit 37, page F2. It's a memo drafted by Harvey Smith, rural utilities program director. And it comments on alternatives or what is called acceptable alternative or alternate water source determination by the district office. And it is, in fact, the next to the last paragraph, beginning with the phrase, "Please note Rural Water – Rural development has accepted contracts in the past."

THE COURT: Okay, I'm with you.

* * *

[42]to continue to sell water at the same rate that McAlester charges other similarly situated Water Districts?

A. No, I can't.

Q. Can you see a benefit to the City of McAlester, were it to be ordered by the Court to continue to sell water at the same rate that is paid for the other districts?

A. They're making a profit on it.

Q. So it would be financially beneficial to McAlester?

A. Yes.

Q. Has McAlester communicated to you in any way that were it to cease selling water to the Water District that it has some other earmarked or designated beneficial use for that water supply that was previously being sent to Pitt-7?

A. I don't think so. I don't know if I understand your question.

Q. Basically I'm wondering if McAlester has told you what they plan on doing with this water that they used [sic] sell to Pitt-7, whether they're going to plan on selling it to somebody else?

A. No, they haven't.

Q. Within this area that McAlester – geographic region for which McAlester currently sells water, including the Water District for which it has customers, are you aware of any other competitor of McAlester who has a water [43] facility that would be adequate to suit the needs of Water Number 7?

A. No, I'm not.

Q. Can you see or perceive harm to the customer base and to the Water District itself were McAlester to cease selling water in June of 1999?

A. Yes, there would be.

Q. What would be that effect if water were to be turned off on June 30th, 1999, what would be the next course that the Water District would need to follow?

A. There really isn't any other source of water for us. And water being the essential entity that it is, I don't know what we would do.

Q. Are you aware of any alternative source available to your customer base for purposes of drinking water, sewer, washing, cleaning, et cetera?

A. No.

THE COURT: Did you say sewer your [sic]?

MR. HARRIS: Yes. And when I say sewer, Your Honor, I'm talking in terms of sewer septic, not necessarily a sanitary sewer system as installed by the City.

THE COURT: All right.

MR. HARRIS: In other words, the water as it leaves the residence has got to go some place.

* * *

[73] Q. Would it [sic] reasonable or practical for the Water District to connect and obtain water from the City of Tulsa or the City of Oklahoma City?

A. No.

Q. Would that also be true with the other entities that counsel asked you about, Atoka, Adamson, Crowder, Krebs and Coalgate?

A. We felt that it would be.

Q. Based upon your knowledge – and how many years have you been with the Water District?

A. Nine years, ten years.

Q. And, based upon your knowledge and experience, would it be reasonable or practical for the Water District to construct its own water facility?

A. No, it would not.

Q. Would it be reasonable and practical to contact – not contact, but connect as a method of alternative water source to the other entities that counsel describe [sic] to you?

A. No, it would not.

Q. And why would it not be reasonable or practical?

A. Expense.

MR. HARRIS: That's all the questions I have.

THE COURT: All right.

MR. BROWN: Your Honor, may I inquire?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	Case No. CIV-97-185-B
CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust,	)	
Defendants,	)	
KENNETH W. SHERILL, et al.,	)	
Additional Defendants.	)	

DECLARATION OF MICHAEL R. SPEAR

COMES NOW Michael R. Spear and under the fines of perjury submit [sic] the following statements and declarations:

1. My name is Michael R. Spear and I am an engineer licensed by the State of Oklahoma.

2. The statements contained herein are based upon my personal knowledge and are true and correct.

3. I have been engaged by Pittsburgh [sic] County Rural Water District No. 7 (Pitt-7) to provide certain professional engineering opinions in this matter, and I am also familiar with the Pitt-7 water distribution system.

4. I have reviewed the alternative water source Pitt-7 submitted to the FmHA when it obtained its current loan and provide the following comments in relation to same:

a. It is possible that an alternative water source for Pitt-7 could be developed from wells north of Arpelar in the South Canadian River alluvial.

b. This water, however, is typically of poor quality with high concentrations of hardness and iron. It would require treatment with a conventional water softening plan.

c. Such a plant would cost about $2,000,000 for a 1 MGD capacity. Operating costs would be approximately $0.75 per 1000 gallons.

d. In addition, test drilling and the purchase of water rights would be required. Also since the location of the water source would change from the east end to the north part of the system it would require 15 miles of 8 to 10 inch waterline to properly distribute the new source. This amount of pipe would cost about $1,000,000.00.

e. The time required to plan and complete such a project would be approximately three (3) years.

/s/ Michael R. Spear
Michael R. Spear

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	Case No. CIV-97-185-B
CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust,	)	
Defendants,	)	
KENNETH W. SHERILL, et al.,	)	
Additional Defendants.	)	

DECLARATION OF JUDY MOORE

COMES NOW the declarant Judy Moore, being of lawful age and under penalty of perjury hereby declares as follows:

1. I am the manager for Pittsburg County Rural Water District No. 7 and the statements contained herein are based upon my personal knowledge and are true and correct.

2. When McAlester began threatening to terminate water sales to Pitt-7, Pitt-7 conducted a thorough search for an alternative water source with no success.

3. We have not been able to locate an *existing*, alternative water source capable of meeting our requirements.

The only source Pitt-7 had available to it that would have been capable, was the Kiamichi Improvement Authority's development of a 6.4 million dollar treatment plant and distribution lines to service an area of approximately 2.5 miles south of Crowder, OK. This regional plant was to serve seven wholesale entities, including Pitt-7. Kiamichi Improvement Authority estimated it will be approximately *three years* until completion of this project. However, this project is now not going forward because participants opted out and it was not feasible for Kiamichi Improvement Authority to complete without sufficient participants.

4. Pitt-7 has engaged Myers Engineering to construct [sic] water collection and treatment facility, but at this time it is anticipated such a project will take approximately 3-4 years to complete, once funding is made available.

5. Pitt-7 has been unable to locate any alternative source of water to serve its customers other than McAlester.

/s/ Judy Moore
Judy Moore